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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

MARIA DEL ROSARIO C. FRAIRE,
Individually and as Next Friend for
MYRA FRAIRE and JUAN ANTONIO FRAIRE,
Minor Children, and
JOSEFA ESQUIVEL FRAIRE, Petitioners
v.
CITY OF ARLINGTON and
JAMES W. LOWERY, JR., Respondents

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

I. Can a Defendant, in an action brought under 42 USC 1983, based on allegations of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment, utilize the doctrine of qualified immunity to dismiss the Plaintiff's claims, and if so, did the Fifth Circuit properly apply the doctrine within the context of the Defendant's Motion for Summary Judgment?

II. Can evidence of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment serve to impose liability on a municipality in an action brought under 42 USC 1983 either through the doctrine of ratification or as some evidence of the existence of constitutionally deficient policies or procedures?

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children and JOSE ESQUIVEL FRAIRE, Petitioners herein, pray that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 10, 1992.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 957 F.2d 1268 (5th Cir. 1992) and is printed in Appendix A hereto infra, page 23. The decision of the United States District Court for the Northern District of Texas is printed in Appendix C hereto, infra, page 25. The judgment for the United States Court of Appeals for the Northern District of Texas is printed in Appendix D hereto, infra, page 26.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1992. (Appendix A, infra, page 23). A timely

petition for rehearing was denied on May 7, 1992 (Appendix B, infra, page 24). The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 USC 1983 states in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourth Amendment to the United States Constitution states, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

This action brought under 42 USC 1983 arises from the death of JAVIER FRAIRE ("Fraire"), who was chased, shot and killed by a plainclothes police officer in an unmarked vehicle because the officer claims he was suspected of driving while intoxicated. The Petitioners presented competent summary judgment evidence that during the entire chronology of the case up to and including the shooting, the officer never displayed any identification

or properly identified his status as a law enforcement officer with the Arlington, Texas Police Department.

On the date of the incident, Fraire was accompanied by a friend, JOSE RODRIGUEZ ("Rodriguez"). Rodriguez and the plainclothes officer who shot and killed Fraire, JAMES W. LOWERY, JR. ("Lowery") were the only witnesses to the entire chronology of events that culminated in the shooting. Rodriguez submitted a fact-specific affidavit attesting to the following chronology of events.

On Sunday, November 22, 1987, Fraire had picked Rodriguez up in his pickup truck. They had stopped at a convenience store to purchase some beer prior to driving to a soccer game to be held later that afternoon. After the purchase, they each opened a can of beer and then

proceeded to leave the convenience store making a right hand turn on Collins Street in Arlington, Texas. After making a proper turn into the farthest right-hand lane, Rodriguez heard a honk coming directly behind Fraire's truck. At that time, Rodriguez saw Fraire make a gesture with his right hand through the rear window of the pickup truck, obviously intended as a response to the honk to the vehicle immediately behind them. Fraire then picked up a chile pepper and waved it out the driver's side window with his left hand. It is undisputed that the vehicle and person behind Fraire at the time both gestures was made was Lowery, a plainclothes warrant officer driving an unmarked police car from the Arlington Police Department. At this time, according to Lowery and to radio

transcripts of the transmission on the date of the incident, the officer radioed for a marked police unit to come to his location for the purpose of stopping Fraire's pickup.[1] In obvious response to the close following of his vehicle by Lowery, Fraire made a right-hand turn off of Collins onto a residential street and then immediately turned into the first driveway on his left and stopped. Instead of continuing to proceed down Collins, like Fraire had obviously hoped, Lowery turned right onto the same residential

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[1] Although Lowery contends that the vehicle was driving erratically as it proceeded down Collins Street, Rodriguez' affidavit specifically contradicts those contentions. The opinion of the Fifth Circuit recited Lowery's version verbatim without noting that Rodriguez had specifically contradicted it. Texas law does, however, prohibit both drinking and driving, Tex. Rev. Stat. Ann. art 6701d, Sec. 107E (Vernon Supp. 1991).

street and parked his vehicle across the street from the driveway where Fraire had parked. After Lowery stopped, he advised the dispatcher of his location, opened the door and got out of his vehicle. At this point in time, before Lowery ever crossed the street, Fraire backed out of the driveway and proceeded down the residential street with Lowery in pursuit.[2]

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[2] As the Fifth Circuit opinion details at some length, Lowery states that he crossed the street, showed his identification and engaged in conversation with both of the occupants at the first stop. In his affidavit, Rodriguez specifically denied Lowery's version as follows:

> "He did not exhibit a badge. There was no conversation either between officer Lowery, Javier Fraire, or myself, as he never got close enough to engage in any conversation. As soon as Javier saw that the man was beginning to walk toward him, he put the

At this point in time, Lowery continued the chase and radioed that the pickup truck was proceeding down a dead end street. When the pickup approached an "L" intersection, Fraire failed to negotiate the left turn and went into a residential yard. As Fraire backed out of the yard, Lowery stopped his vehicle and radioed that the truck was trying to hit his car. When Fraire's pickup reentered the street he proceeded forward to the

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> truck in reverse, backed out of the driveway with the rear of the truck moving toward Collins, put the car in drive and passed the vehicle driven by Lowery. At the time we passed his vehicle, Lowery was already back in his car. The statement he makes in his affidavit in regard to a display of the badge and a conversation between Lowery and Javier is not true." (TR3, pp 559-560).

first street on his left, which he obviously didn't recognize to be a cul de sac. As he made the left turn, Lowery's vehicle was in pursuit behind him. Although prior to this time, there were no witnesses to this incident other than the occupants of the two vehicles, there were at least eight eyewitnesses who lived in and around Creekmere Court (the cul de sac) who gave statements to the Arlington, Texas Police Department as to what transpired next. All of these witnesses' statements and Rodriguez' statements are substantially similar in describing an effort by Fraire to circle and exit the cul de sac. After Lowery entered Creekmere Court, he parked his unmarked vehicle and exited it while pulling out his nine millimeter revolver. Rodriguez states that Lowery "had walked out from

the right side of his car in what I thought was an effort to block Javier's exit from the circular street. At no time while we were in the circular street did I see Lowery show a badge. I never realized that Lowery was a police officer until I heard him ask for assistance on his car radio." As Javier proceeded to exit the cul de sac in his pickup, he approached the position where Lowery was standing with his drawn revolver. Most of the eyewitnesses heard Lowery yell something, but with the noise from the screeching tires, no one could identify exactly what he had said. As the truck approached the exit and got nearer to where Lowery was standing, he fired one shot from his nine millimeter pistol which hit Fraire in the middle of the forehead, causing the pickup truck to veer to the left and run into a

tree. Fraire died shortly thereafter from the wound.

On the date of the shooting, Section 317.05 of the General Orders of the Arlington, Texas Police Department prohibited the discharging of firearms in any misdemeanor case unless in defense of life and prohibited further shooting "at a moving or fleeing vehicle except in defense of an officer's life or another person's life and all other reasonable means of defense have failed." (TR1, p106). Although Lowery's version of what transpired on Creekmere Court can be said to have constituted a compliance with this regulation, his version of the facts is contradicted not only by Rodriguez, but by every other eyewitness to the occurrence. According to Lowery, he never walked into the center of the cul de sac for the

purpose of stopping Fraire's vehicle. According to Lowery, he hid behind the rear of his vehicle, using it as a shield as he prominently displayed his badge and repeatedly identified himself as a police officer. He denies that Fraire ever attempted to leave the cul de sac; instead, he describes two separate and distinct attempts by Fraire to ram his truck into Lowery's vehicle while he hid behind it as a shield:

> As I reached my car, Fraire had backed up all the way across to the other side of the cul de sac, had put the car in drive, gunned the engine and began to drive directly at the center of my car. At this time, I believed that Fraire was going to hit me or smash my car into me. When he was only about three feet away from me, Fraire stopped the truck. At this time, I did not know whether he was trying to hit my car, disable my vehicle or run me down. However, I feared for my life and believed that he was either trying to hit me or trying to ram my car into me. I therefore withdrew my pistol from the holster and

> stepped back behind my car, using the corner of it as a shield in case he tried to hit me. By this time I believed that marked units were likely in route and had decided that I would simply let the truck pass me by without trying to stop it. (TR1, p278)

Lowery then describes the truck backing up and making a second intentional assault on himself and his vehicle as he hid behind it. He states that he held his badge open in his left hand as he fired one shot from his weapon in his right hand to prevent Fraire from hitting his automobile or running him over with it.

It has always been the contention of the Petitioners that Lowery manufactured his version of the incident on Creekmere Court in order to place himself in compliance with regulations that he was prohibited from firing at a moving vehicle unless in self-defense and all other means

of defense have failed. Although there is some variation in each of the statements by the eight eyewitnesses who live in and around Creekmere Court, their versions of events contradict Lowery's in each of the following respects:

1) None of the eyewitnesses make any mention of Lowery ever exhibiting a badge while on Creekmere Court;

2) None of the accounts describe Lowery hiding behind the rear of his vehicle;

3) None of the statements of the eyewitnesses contain any description which would comport with an intentional assault on Lowery as he hid behind his vehicle;

4) All of the accounts place Lowery holding his gun in both hands as he stood in Creekmere Court away from his car in an obvious effort to block the exit of

Fraire's pickup.

In accordance with Arlington policy, an internal affairs investigation was initiated on the date of the incident and was later reduced to written form. The investigation contained transcripts of interviews with both Lowery and Rodriguez as well as written statements made by the eight witnesses on Creekmere Court. Although the report detailed the version of the incident as accounted by Lowery, it made no mention of any discrepancies between his version and those of the eyewitnesses and Rodriguez. It did describe that Lowery stated that he never intentionally put himself in front of the truck but had utilized his car as a shield because he was afraid the truck was trying to hit him (TR3, p585). Yet the report concludes that "Officer Lowery got out of

his car on Creekmere to try to stop the pickup truck driven by Javier Fraire. He went out into the court away from his car... and at the time he fired the pickup truck was only 8-12 feet away from the officer and headed directly toward him." (TR3, p587-588). In other words, the City of Arlington's own internal affairs reports repudiated the version given by Lowery which version was obviously concocted for the purpose of showing that he had complied with the prohibition against shooting moving vehicles unless all other means of defense had failed. Although he was criticized for "tactical errors," he was exonerated by the internal affairs investigation as well as the Chief of Police of the City of Arlington, who reviews every such report and has ultimate authority to discipline any officer.

Three months after the incident made the basis of this action, Section 317.05 of the General Orders of the Arlington Police Department were amended to read as follows:

> (g) Officers will not discharge a firearm at or from a moving vehicle except when:
>
> 1. the suspect is using deadly force against the officer or others by means other than the vehicle; or
>
> 2. all other means of reasonable means have failed.
>
> Officers will not voluntarily or recklessly place themselves in a position in front of an oncoming vehicle where deadly force is a likely outcome. The authorization to use deadly force ceases when the vehicle is no longer a threat.

The Petitioners initially brought this action into state court but it was properly removed to the United States District Court for the Northern District of Texas. Respondent Lowery filed a

Motion for Summary Judgment relying on the doctrine of qualified immunity and attached his affidavit as supporting documentation for his motion. The City of Arlington filed its Motion for Summary Judgment relying, in part, on an affidavit from the Chief of Police that it is his role to review all internal affairs investigations and to exonerate or punish Arlington Police Officers as a result of such incidents. The District Court granted both motions for summary judgment and dismissed the Petitioners' constitutional claims. By opinion dated April 10, 1992, the United States Court of Appeals affirmed. Relying heavily on Lowery's affidavit and disregarding Rodriguez' claims that Lowery was attempting to block Fraire's exit from the cul de sac, the court concluded that

Lowery "does not appear to have been trying to hinder Fraire's escape," 957 F.2d at 1278. The court affirmed the District Court's ruling that Lowery was entitled to qualified immunity in the context of the law as it existed at the time of the incident in question. Thus, the court analyzed Lowery's actions in the context of Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981). The court did not reference Rodriguez' affidavit but did refer to a statement he had given the police after the incident when he was asked whether Fraire's truck was going to hit Lowery and he responded "it was close." The court then noted that this statement was made by Rodriguez "in his hostility." [3] Although the court conceded

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[3] Although the Fifth Circuit panel attempted to disparage Rodriguez' account of the accident as a result of his

that Lowery may not have followed established police procedures by displaying his badge and identifying himself while in plainclothes, it held he was still entitled to qualified immunity under the Shillingford standard and affirmed the dismissal of Petitioners' claims against Lowery on the grounds of qualified immunity. In addition, the court affirmed the District Court's dismissal of Petitioners' claims against the City of Arlington on the basis that allegations of an isolated incident are not sufficient to show the existence of a constitutionally deficient custom or policy. As to the Petitioners' claim that

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"hostility" to Lowery's version of events, the City of Arlington dismissed outstanding traffic tickets as a result of his cooperation with the police department after the incident.

the City of Arlington was aware that Lowery was not telling the truth in describing the incident on Creekmere Court, the court concluded that any such discrepancies were "relatively minor" and might be produced in "the tension and heat of the pursuit and the element of surprise in such a stressful situation", 957 F.2d at 1281. Ruling that the Petitioners have provided no evidence that Arlington had either ratified the use of unlawful and excessive force or maintained constitutionally deficient policies or procedures, it dismissed the Petitioners' claim against the City.

The Petitioners timely filed a Petition for Rehearing which was overruled by order dated May 7, 1992.

**REASONS FOR GRANTING WRIT**

I. Can a Defendant, in an action brought under 42 USC 1983, based on allegations of

an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment, utilize the doctrine of qualified immunity to dismiss the Plaintiff's claims, and if so, did the Fifth Circuit properly apply the doctrine within the context of the Defendant's Motion for Summary Judgment?

A. Certiorari should be granted to resolve conflicts among the circuits.

In Graham v. Connor, 490 US 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989) this Court held that claims that law enforcement officials have used excessive force -- whether deadly or not -- in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its standard of objective reasonableness, but left open the question as to whether or not the doctrine of qualified immunity was available to the law enforcement officer in defending his conduct, Id, note

12, 109 S. Ct. at 1873. Prior to Graham, courts had analyzed such cases as a violation of either substantive due process under the Fourteenth Amendment, which prohibits egregious conduct that shocks the conscience, or under the Fourth Amendment. Those courts considering substantive due process claims would not consider whether a police officer could properly assert the defense of "good faith" or qualified immunity because such conduct per se was without justification. Those courts that utilized the Fourth Amendment in analyzing excessive force claims were divided as to whether qualified immunity could be raised by the law enforcement officer in defense of the claim. Many courts ruled that qualified immunity is not available to immunize the defendant because laws clearly establish

that the use of excessive force is unlawful see, e.g., Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988); Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986); Stevens v. Corbell, 832 F.2d 884, 890 (5th Cir. 1987); Vizbaras v. Priber, 761 F.2d 1013, 1018-1019 (4th Cir. 1985) (Winter, J., concurring and dissenting), cert den'd 474 U.S. 1101 (1986); Clark v. Beeville, 730 F.2d 739, 740 (11th Cir. 1984); Stanulonis v. Marzec, 649 F.Supp. 1536, 1545 (D.Conn. 1986); Patzner v. Burkett, 779 F.2d 1363, 1370 (8th Cir. 1985)(allowing qualified immunity as to warrantless arrest but not to excessive force claim).

Other pre-Graham courts have ruled that qualified immunity is a defense to a Fourth Amendment claim alleging unnecessary force during an arrest, see,

e.g., Whitt v. Smith, 832 F.2d 451, 452-454 (7th Cir. 1987); White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986); Acoff v. Abston, 762 F.2d 1543, 1548-50 (11th Cir. 1985); Varella v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984); Bauer v. Norris, 713 F.2d 408-411 (8th Cir. 1983); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1347 (2nd Cir. 1972).

The decision in Graham did nothing to resolve the conflicts among the circuits. In Dixon v. Richer, 927 F.2d 1456 (10th Cir. 1991), the court held that in excessive force claims asserted under the Fourth Amendment, the qualified immunity question is always answered within the Fourth Amendment inquiry because "in the excessive force context, the Fourth Amendment inquiry asks directly whether

the police officer reasonably could have believed that the force was necessary under the circumstances...This is not a circumstance where the officers relying on the probable cause determination of a magistrate. The police officer is the sole actor whose subjective reasonableness is at issue." Id., 922 F.2d at 1463. See also Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991). In Jackson v. Hoylman, 933 F.2d 401, 403 (6th Cir. 1991), the court affirmed a district court holding that qualified immunity is not available in an excessive force case because the issue "turns on the same objective reasonableness standard that the claim of excessive force turns on..." In Hunter v. District of Columbia, 943 F.2d 69, 77 (D.C. Cir. 1991), the court held that "(w)e too doubt whether a

substantively distinct qualified immunity defense would be available to an officer acting after Graham..." Other courts continued to allow law enforcement officers to raise the doctrine of qualified immunity in excessive force cases, see, e.g., Finnegan v. Fountain, 915 F. 2d 817, 822-823 (2nd Cir. 1990); Brown v. Glossip, 878 F.2d 871, 873-874 (5th Cir. 1989)

B. Certiorari should be granted because those courts that recognize qualified immunity in excessive force claims are uncertain as to what standard to apply separate and apart from the Graham criterion of objective reasonableness.

Although the court in Finnegan v. Fountain, 915 F.2d 817 (2nd Cir. 1990) recognized the defense of qualified immunity in an excessive force case, it noted what it characterized as a

"doctrinal tension" in the case law by the failure of this court to explain "how the two standards of reasonableness under the claim and the defense differ from each other," Id, note 11 at 824. Several courts, in analyzing excessive force cases for behavior occurring prior to Graham have continued to apply substantive due process analysis in analyzing the defense of qualified immunity to determine the clearly established right of which a reasonable officer would have been aware before the decision in Graham, see, e.g., Mouille v. Live Oak, 918 F.2d 548, 551 (5th Cir. 1990); Chathas v. Smith, 884 F.2d 980, 989 (7th Cir. 1989); Hannula v. Lakewood, 907 F.2d 129, 131-32 (10th Cir. 1990).

This is exactly what the Fifth Circuit panel did in this case. The Shillingford

standard utilized by the Fifth Circuit was a tripartite test founded upon the Fourteenth Amendment's concept of substantive due process, Brown v. Glossip, 878 F.2d 871, 872 (5th Cir. 1989). Hence the court determined that Shillingford was the "clearly established law at the time of the incident made the basis of this action." The Petitioners not only had to overcome an objective reasonableness claim in seeking liability but also a substantive due process defense in circumventing the qualified immunity question. This is a perversion of the decision in Graham.

C. This court should grant certiorari because the rationales underlying qualified immunity for public officials are not applicable to law enforcement officers accused of excessive and deadly force in violation of the Fourth Amendment.

In Wyatt v. Cole, _____ US _____, 118

L.Ed.2d 504 (1992), the Court refused to expand the doctrine of qualified immunity to private parties being sued under 42 US 1983 because the rationales underlying the doctrine were not transferable to those defendants. The policies underlying qualified immunity are to preserve the ability of governmental officials to serve the public good and not be deterred by the threat of damage suits with little or no merit. Its purpose is to safeguard government and the public at large and not to insulate its agents.

Law enforcement officials are and should be aware that the use of excessive and unreasonable force could subject them to civil liability. As a result, policies and rationales underlying the qualified immunity doctrine are not transferable to law enforcement officials accused of such

action.

D. This court should grant certiorari because the standard for qualified immunity in excessive force cases under the Fourth Amendment is exactly the same as the standard enunciated in Graham.

The standard for liability in excessive force cases as established in Graham is and should be identical to the standard for qualified immunity. One commentator, after reviewing Fourth Amendment excessive force cases and the standard for qualified immunity, has concluded as follows:

> In applying the current standard for qualified immunity to excessive force claims alleging a violation of the Fourth Amendment, courts should recognize that qualified immunity is an unnecessary defense because the standard for qualified immunity is identical to the Fourth Amendment standard for liability. Both the general principle of law and the contours of the Fourth Amendment right to be free from excessive force are established; the Fourth Amendment prohibits unreasonable force, and it questions whether a reasonable officer would have believed the force was necessary.... Courts should recognize that when

> the fact finder determines the issue of liability under the Fourth Amendment, it automatically determines the issue of qualified immunity, Urbonya, "Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force" 62 TEMPLE LAW REV. 61, 115-116 (1989).

II. Can evidence of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment serve to impose liability on a municipality in an action brought under 42 USC 1983 either through the doctrine of ratification or as some evidence of the existence of constitutionally deficient policies or procedures?

A. Certiorari should be granted to resolve conflicts among the lower courts.

Certainly it is clear that the doctrine of respondeat superior is not available to a claimant in seeking to impose liability on a governmental unit as a result of misconduct by its employees, Monell v. Dept. of Social Services, 436 US 658, 691 (1978). This Court has ruled that municipal liability can be imposed on

actions for which the municipality is actually responsible and thus such liability may be imposed for a "single decision by municipal policy makers under appropriate circumstances", Pembaur v. Cincinnati, 475 US 469, 479-480 (1986). The Court made clear that municipal liability would attach only where the decision maker possess final authority to establish municipal policy with respect to the action ordered, Id. 475 US at 483.

Some courts have held that a city's custom or policy authorizing or encouraging police misconduct cannot be inferred in its decision not to discipline an officer for a single incident of constitutional illegality, see, e.g., Santiago v. Fenton, 891 F.2d 373, 380-382 (1st Cir. 1989); Batista v. Rodriguez, 702 F.2d 393, 397-398 (2nd Cir. 1983);

Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1986)cert den'd 484 US 986 (1987); Davis v. City of Ellensburg, 869 F.2d 1230, 1233-1235 (9th Cir. 1989); Depew v. City of St. Marys, 78 F.2d 1496, 1499 (11th Cir. 1986).

Other courts have imposed municipal liability as a result of one incident as either evidence of a defective policy or procedure or as authorization or ratification of the unconstitutional conduct, see, e.g., Grandstaff v. City of Borger, Texas, 767 F.2d 161, 171 (5th Cir. 1985), cert den'd 480 US 916 (1987)("the disposition of the policy maker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance there were no reprimands, no discharges and no admissions of error"); McRorie v. Shimoda,

795 F.2d 780, 784 (9th Cir. 1986)("policy or custom may be inferred, if after the shakedown, the prison officials took no steps to reprimand or discharge the guards, or if they otherwise failed to admit the guard's conduct was in error"); Slakan v. Porter, 737 F.2d 368, 372 (1984)("liability in this context is not premised on respondeat superior ... but on a recognition that a supervisory indifference or a tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict to those committed to their care"). This court should grant certiorari to resolve the conflicts existed among the circuit courts as they pertain to the imposition of municipal or governmental authorization or ratification of unconstitutional conduct.

B. This court should grant certiorari because a municipality's failure to objectively and impartially investigate the conduct of its own employees as it pertains to the utilization of excessive and unreasonable force should entail the potential for civil liability.

This court has already ruled that subsequent conduct may prove discriminatory motive in a prior employment decision, McDonell Douglas Corp. v. Green, 411 US 792, 802 (1973) and that subsequent acts may tend to prove the nature of prior conspiracy, Anderson v. United States, 417 US 211, 219 (1974). Thus, subsequent acceptance of dangerous and reckless conduct by the policy maker would tend to prove a pre-existing disposition and policy, Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985) or a ratification or authorization of that conduct.

In this case, the City of Arlington put

into issue the internal affairs investigation of the shooting of Javier Fraire. The Chief of Police, who promulgates all orders, rules and regulations for the police department, signed an affidavit stating that the internal affairs division "performed a thorough, detailed investigation of the circumstances surrounding the shooting." He continued:

> I have reviewed the statement of Officer James W. Lowery, Jr. and the statements of the witnesses who live near the scene of the incident and witnessed the shooting. Based on these statements, Officer Lowery did not violate any of the Arlington Police Department's General Orders or engage in misconduct, and I have not imposed any discipline on him as a result of that incident. (TR1,pp65-75)

Despite this testimony, it is clear that the internal affairs report itself reflects the fact that Lowery was not

telling the truth when he described the shooting on Creekmere Court. It is clear that Lowery manufactured a scenario in which he could say that he complied with the policy prohibiting the shooting of a vehicle unless "in self-defense when all other defenses have failed." Although the Fifth Circuit's opinion describes difference versions as "minor factual discrepancies... far too petty to constitute genuine issues of material fact", it is clear that the two versions can not be reconciled and that the internal affairs report itself serves to refute Lowery's veracity in what transpired.

When any law enforcement agency assumes within its responsibility the obligation to investigate and discipline itself, it must recognize and appreciate the

institutional forces of self-protection and preservation that serve to subvert that role. Therefore, the potential for the imposition of civil liability could serve not only as an incentive to properly accomplish lawful objectives but also to strengthen the integrity of our system of law enforcement.

## CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari issue from this honorable court to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the petition is granted, the Petitioners pray that judgment of the court below be reversed, that the cause by remanded to the District Court for trial on the merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed postage prepaid, certified mail, return receipt requested to counsel for James W. Lowery Jr., Ernest E. Figari, Jr. and Gary E. Eisenstat, FIGARI & DAVENPORT, 4800 NCNB Plaza, 901 Main Street, Dallas,

Texas 75202 and counsel for the City of Arlington, Mr. Gregory S. Norris and Mr. Robert E. Diaz, Assistant City Attorneys, City of Arlington, Texas, Box 231, Arlington, Texas 76004-0231 on this the 26th day of August, 1992.

LAWRENCE L. MEALER